

STATE OF MICHIGAN
COURT OF APPEALS

TRIANGLE EXCAVATING COMPANY, INC.,

Plaintiff-Appellant,

v

COVERT TOWNSHIP,

Defendant-Appellee.

UNPUBLISHED

December 20, 2005

No. 255507

Van Buren Circuit Court

LC No. 03-50-596-CK-B

Before: Owens, P.J., and Saad and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from the trial court's order granting defendant's motion for summary disposition on Count II of plaintiff's complaint pursuant to MCR 2.116(C)(10). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In 2002, plaintiff entered into a contract with defendant to install approximately seven miles of water main in Covert Township. Defendant's project engineer, C. C. Johnson and Malholtra (CCJM), supervised plaintiff's work. During the excavation, plaintiff encountered unmarked telephone lines and fiber optic cables meandering through the jobsite. Plaintiff had to move the excavation to the opposite side of the street because of these obstructions and asserts that this caused it to suffer delays and additional expenses. In January of 2003, plaintiff filed a three-part complaint alleging that (1) defendant refused to pay the remaining \$30,000 of the contract price, (2) plaintiff was entitled to additional compensation under the contract because it encountered unforeseen difficulties during the excavation, and (3) because defendant accepted the benefits of plaintiff's work without making payments, it had been unjustly enriched. Defendant moved for summary disposition on all three counts. The trial court denied the motion as to Count I, but granted summary disposition of Counts II and III. This Court then granted plaintiff's application for leave to appeal the dismissal of Count II.

On appeal, plaintiff contends that the trial court erred in dismissing count II because a question of material fact existed as to whether defendant had constructive notice of plaintiff's claims for damages due to unforeseen site conditions.

The decision to grant or deny summary disposition presents a question of law that we review de novo. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 426; 670 NW2d 651 (2003). Similarly, the proper interpretation of a contract constitutes a question of law subject to de novo

review. *Id.*, citing *Archambo v Lawyers Title Ins Corp*, 466 Mich 402; 408, 646 NW2d 170 (2002).

Under MCR 2.116(C)(10), summary disposition is appropriate where “there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When ruling on motions brought under this rule, courts must consider “the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party.” *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

The main goal of contract interpretation is to enforce the parties' intent. *Mahnick v Bell Co*, 256 Mich App 154, 158-159; 662 NW2d 830 (2003). When the language of a document is clear and unambiguous, interpretation is limited to the actual words used. *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491, 496; 628 NW2d 491 (2001). No ambiguity exists where a contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation. *Meagher v Wayne State University*, 222 Mich App 700, 722; 565 NW2d 401 (1997). An unambiguous contract must be enforced according to its terms. *Mahnick, supra*, 159.

In the instant case, section 4.03 of the contract between plaintiff and defendant deals with “differing subsurface or physical conditions.” Paragraph A of this section requires the contractor to provide notice if it believes the conditions at or contiguous to the work site are of an unusual nature and differ “materially from conditions ordinarily encountered and generally recognized as inherent in work of the character provided for in the Contract Documents.” If such a condition is found, the

CONTRACTOR shall, promptly after becoming aware thereof and before further disturbing the subsurface or physical conditions or performing any Work in connection therewith (except in an emergency as required by paragraph 6.16.A), notify OWNER and ENGINEER in writing about such condition. CONTRACTOR shall not further disturb such condition or perform any Work in connection therewith (except as aforesaid) until receipt of written order to do so.

Further, paragraph C of section 4.03 states that the contractor

shall not be entitled to any adjustment in the Contract Price or Contract Time if:

* * *

c. CONTRACTOR failed to give the written notice within the time and as required by paragraph 4.03.A

The unambiguous terms of the contract required plaintiff to immediately stop work and provide defendant and defendant's engineer with written notice if plaintiff wanted to receive compensation for additional expenses incurred due to unforeseen subsurface or physical conditions. According to the affidavit of its site inspector, Steven Beight, CCJM knew that

plaintiff encountered the unforeseen conditions and had been given notice of plaintiff's intent to request additional compensation. But the affidavit of plaintiff's project manager, Guy Sinacola, makes it clear that plaintiff did not stop its work upon discovering the unforeseen conditions and only gave defendant's engineer oral notice of the existence of the unmarked cables. Although it eventually made a written request for additional compensation, plaintiff did not do so until thirteen days after it first encountered the conditions. Even when viewed in a light most favorable to plaintiff, the affidavits and other documents establish that plaintiff failed to comply with the terms of its contract with defendant. Consequently, plaintiff is not entitled to any adjustment of the contract price and the trial court did not err in granting defendant's motion for summary disposition.

Nevertheless, plaintiff argues that, even if the contract would ordinarily bar its request for additional compensation, a question of material fact exists regarding whether defendant waived the notice requirement. It asserts that, as CCJM's on-site inspector, Beight authorized plaintiff to change the location of its excavation, accepted notice of plaintiff's additional claims, and verified the amount of the claims. Thus, plaintiff contends that the trial court erred in granting defendant's motion without considering whether Beight's actions waived defendant's right to written notice.

"While the freedom of contract principle is served by requiring courts to enforce unambiguous contracts according to their terms, the freedom to contract also permits parties to enter into new contracts or modify their existing agreements." *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 370-371; 666 NW2d 251 (2003). A waiver constitutes a "a voluntary and intentional abandonment of a known right." *Id.*, 374. To establish the modification or waiver of a contract provision, one must show "by clear and convincing evidence that the parties mutually agreed to a modification or waiver of the contract." *Id.*, 372, citing *Banwell v Risdon*, 258 Mich 274, 278-279; 241 NW 796 (1932).

Our Supreme Court further explained:

The mutuality requirement is satisfied where a modification is established through clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to waive the terms of the original contract. In meeting this clear and convincing burden, a party advancing amendment must establish that the parties mutually intended to modify the particular original contract, including its restrictive amendment clauses such as written modification or anti-waiver clauses. [*Quality Products, supra*, 373, emphasis in original.]

Where a party attempts to rely on a "course of conduct to establish modification" the existence of mutual assent is less clear and "a waiver analysis is necessary." *Id.*, 373-374.

In *Quality Products, supra*, 365, the plaintiff served as a sales representative for the defendant. According to the terms of its contract, the plaintiff could not earn commissions for sales made to "machine tool suppliers." *Id.*, 365-366, 375. Viewing the facts in the light most favorable to the plaintiff, our Supreme Court found that the defendant (1) knew the plaintiff was actively soliciting the business of machine tool suppliers, (2) knew the plaintiff expected

commissions on any resulting sales, and (3) failed to object to the plaintiff's "solicitation of the excluded customers until after the sales were completed." *Id.*, 376. But the plaintiff did not submit any evidence of representations or affirmative conduct by the defendant indicating that it intended to relinquish its right to confine the parties' relationship to the terms of the contract. *Id.*, 377. The Court held that the defendant's mere silence, regardless of whether it possessed knowledge of the plaintiff's sales activity outside the contract, did not amount to an intentional relinquishment of the contract's limitations. *Id.*, 377-378. Consequently, the plaintiff could not establish waiver of the provision dealing with sales commissions and the trial court correctly granted the defendant's motion for summary disposition. *Id.*, 378, 380.

In the instant case, even when examined in a light most favorable to plaintiff, the evidence fails to establish mutual assent to modify the contract and waive the written notice requirement. Beight's affidavit states that CCJM had knowledge of the difficulties encountered by plaintiff and that plaintiff would be making a claim for additional compensation. Even if the engineer's knowledge were imputed to defendant, the mere fact that defendant knew plaintiff intended to seek compensation not permitted by the contract does not constitute a waiver of its rights under the agreement. As in *Quality Products*, the record contains no evidence of any representations or affirmative conduct on the part of defendant that suggests it intended to waive the requirement that plaintiff immediately cease work and provide written notice if it encountered unforeseen difficulties. Because plaintiff failed to present clear and convincing evidence that defendant intended to waive this requirement, the trial court did not err in granting defendant's motion for summary disposition.

Affirmed.

/s/ Donald S. Owens
/s/ Henry William Saad
/s/ Karen M. Fort Hood